

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

EAST END BUS LINES, INC.

And

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 1205**

Case Nos.	29-CA-161247
	29-CA-162261
	29-CA-166857
	29-CA-169382
	29-CA-172090
	29-CA-178014

And

SHARON TARRY

**RESPONDENT'S EXCEPTIONS OF THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relation Board's Rules and Regulations, Respondent East End Bus Lines, Inc. (hereinafter referred to as "Respondent") hereby files the following exceptions to the Decision of Administrative Law Judge Ira Sandron (hereinafter "the ALJ"):

1. Exception is taken to the ALJ's conclusion that not calling certain witnesses (including but not limited to Safety Manager Helen Lachez ("Lachez"), Dispatcher Barbara Nunziata ("Nunziata"), former Safety Department Director Anthony Reid ("Reid"), and Safety Supervisor Donna White ("White")) leads to an adverse inference that their testimony could not have been favorable to the Respondent and that the testimony of the General Counsel's witnesses should be credited for such reason (ALJ Dec. page 7, line 23 to page 8, line 9).

2. Exception is taken to the ALJ's conclusion that the testimony of President John Mensch ("Mensch") about when he learned about the decision to discharge Sharon Tarry ("Tarry") was contradicted by the testimony of Vice President Jennifer Thomas ("Thomas") (ALJ Dec. page 9, lines 1 to 5).

3. Exception is taken to the ALJ's conclusion that Mensch's testimony about not learning about Tarry's discharge until after the fact was contradicted by the testimony of Thomas (ALJ Dec. page 9, lines 3-5).

4. Exception is taken to the ALJ's conclusion that Dispatcher Lorraine Giugliano ("Giugliano") was not a credible witness. (ALJ Dec. page 9, lines 7 to 38).

5. Exception is taken to the ALJ's conclusion that Thomas was not a credible witness when addressing matters pertaining to Tarry's disciplines (ALJ Dec. page 10, lines 8 to 22).

6. Exception is taken to the ALJ's conclusion that it is plausible that Nunziata would have relayed to Safety Supervisor Joseph Vopat ("Vopat") orally more information than she had written down (ALJ Dec. page 10, lines 24 to 32; page 11, lines 9 to 11).

7. Exception is taken to the ALJ's conclusion that Vopat was deliberately embellishing what was reported to him (ALJ Dec. page 10, lines 32 to 33).

8. Exception is taken to the ALJ's conclusion that details in Vopat's investigation report indicates an intention to exaggerate the egregiousness of Tarry's conduct (ALJ Dec. page 10, lines 33).

9. Exception is taken to the ALJ's conclusion that Vopat's spending hours over the weekend reviewing bus records and maps strikes him as suspicious in the absence of evidence the he normally spends his weekends investigating safety complaint (ALJ Dec. page 11, lines 4 to 7). First, Vopat was not asked if he normally spends time on weekends investigating safety complaints. Second, there was a legitimate reason for Vopat to continue his investigation over the weekend, protecting the safety of children, which is of the utmost importance to the Respondent. By verifying whether the manner in which Tarry drove was dangerous, Respondent was able to prevent Tarry from getting behind the wheel early Monday morning. This is demonstrated by the fact that Vopat instructed dispatch to remove the key from Tarry's bus and to inform her as soon as she arrived for work to report to the safety trailer (Tr. 814, 1360).

10. Exception is taken to the ALJ's conclusion that Vopat's sharing of the results of his investigation with Safety Supervisor Donald Shukri ("Shukri"), who had not been at work in the afternoon on Friday, October 16, 2015, the day of the incident, is "perplexing" or "makes no sense" because Thomas had already approved of the recommendation. (ALJ Dec. page 11, lines 11 to 22). Although Thomas had approved of the recommendation, Vopat still had discretion to "delay the proceedings" (Tr. 814), a point completely ignored by the ALJ. Thus, Vopat shared the results of his investigation with Shukri on Monday morning (Tr. 814). As stated by Vopat, "I wanted to confirm with Mr. Skukri just in case that I missed something or maybe I was wrong, get his opinion, and then we could have delayed the proceedings. But, no, instead he told me that [] he

agreed with my findings. So we then moved forward with the termination.” Tr. 814. Thus, there is nothing untoward, perplexing, or nonsensical in Vopat sharing the evidence with Shukri before proceeding with the discharge.

11. Exception is taken to the ALJ’s conclusion that Vopat “failed to even talk to [] Tarry prior to terminating Tarry,” that his not doing so was “puzzling,” and that Vopat did not interview Tarry before terminating her (ALJ Dec. page 11 line 24 to page 12, line 2). Vopat did talk to Tarry. Vopat told Tarry that the Company had received a complaint from a motorist who stated that she went around, passed her in oncoming traffic, and then swerved back in front of her again (Tr. 815, R Ex. 23). Vopat also stated that the motorist said it was on County Road 51. In response to that statement, Tarry told Vopat that County Road 51 is a four-lane highway (Tr. 815, R Ex. 23). Vopat agreed, but said that “the incident happened on Lake Avenue. We have the video footage. We have the GPS data.” (Tr. 815, R Ex. 23). While Vopat did tell Tarry that the allegations have been substantiated and that her services with the company are being terminated (Tr. 816, R Ex. 23), Tarry responded, “that’s crazy, I want to see the video” (Tr. 778, 816, R Ex. 23), and she was permitted to watch the video. After she watched the video, Tarry had an opportunity to offer a further explanation; however, she did not do so. Rather, Tarry said, “that’s all you got, that’s nothing, I will own this company” (Tr. 778, 816-817, R Ex. 23). Tarry was then asked to leave the property and, after she initially refused, she complied (Tr. 817, R Ex. 23).

Vopat also testified that he gave Tarry the opportunity to write down a rebuttal on the termination notice, but she did not take advantage of that opportunity (Tr. 868).

Based on the foregoing, Mr. Vopat did speak to Tarry, and whether that discussion was an “interview” or not is just a matter of semantics given the fact that Tarry had the opportunity to respond to the findings, did respond by contesting that whether she was on Lake Avenue, requested

to see the video, and she was offered the opportunity to further comment but declined to do so. The ALJ's view of the matter is thus erroneous.

12. Exception is taken to the ALJ's conclusion that Vopat's not talking to the motorist who called in the complaint, Toni Gerwycki ("Gerwycki"), until after the discharge was "puzzling" or "curious". (ALJ Dec. page 11, lines 24 to 25; page 12, lines 4 to 15). Vopat explained that, initially, there was confusion about where the incident took place (County Road 51 vs. Lake Avenue), that he wanted to narrow that down, and that he solicited that statement after the discharge because he wanted to have her statement on file "just to confirm that we were not mistaken on the location where this incident happened." Tr. 870-871. Thus, there is nothing puzzling or curious about a former police officer gathering further evidence to confirm his initial findings.

13. Exception is taken to the ALJ's conclusion that Vopat did not take notes of his conversation with Gerwycki; did not provide an explanation for doing so, and Respondent did not provide a statement from Gerwycki. (ALJ Dec. page 12, lines 17 to 20). Vopat obtained a statement from Gerwycki, and Respondent's counsel sought to admit it into evidence, but the ALJ declined to accept it into evidence (Tr. 817-818). It is thus improper to refuse to accept a document into evidence and then assert that Respondent did not introduce Gerwycki's statement at trial.

14. Exception is taken to the ALJ's conclusion that Vopat presented an inconsistent, illogical and incredible account of his investigation into the October 16, 2015 incident involving Tarry. (ALJ Dec. page 12, lines 22 to 23). As shown in the accompanying brief in support of these exceptions, the account of the investigation is consistent, logical, and credible.

15. Exception is taken to the ALJ's conclusion that Tarry was for the most part credible, had good recall, answered questions readily and without hesitation. (ALJ Dec. page 12, lines 39 to 41).

16. Exception is taken to the ALJ's conclusion that Tarry had very good recall, answered questions readily, and showed candor in most of her answers. (ALJ Dec. page 12, lines 43 to 44).

17. Exception is taken to the ALJ's conclusion that the location where Tarry crossed over the double yellow line, Lake Avenue, is not clear. (ALJ Dec. page 13, lines 7 to 17). As shown in the accompanying brief in support of these exceptions, the record is clear that Tarry was speeding in a forty mile per hour zone, crossed over the double yellow line, and drove recklessly, all on Lake Avenue.

18. Exception is taken to the ALJ's conclusion that the Company follows a progressive discipline procedure (ALJ Dec. page 16, lines 35 to 36) and that it was not followed with respect to Tarry's unprecedented, extremely dangerous driving incident is evidence of animus toward her. As is always the case, there are certain offenses that are so egregious that an employee can be immediately discharged without having been given a prior warning. Vopat testified at pages 868 to 869:

Q With progressive discipline, are there circumstances where progressive discipline is not followed?

A Yes.

Q What kind of circumstances are those?

A As I explained with Ms. Santana.

Q Is there a difference between progressive disciplines and more severe disciplines?

A Yes. Lesser disciplines, they would result in a verbal warning, where more serious disciplinary actions would involve suspension and even termination. So, yes, there is a difference.

Are there ever circumstances where termination is required?

JUDGE SANDRON: No, I think that --

MR. CHILDHERHOSE: We can stipulate there is. If someone shoots their co-worker, they get fired.

JUDGE SANDRON: Right, yes. I think that would be -- or punches the boss, I think you wouldn't need a second offense.

MR. CHILDHERHOSE: I'm sure. That's a verbal warning,

depends on the workplace.

MR. GROH: Well, then Ms. Tarry's circumstances was --

JUDGE SANDRON: I don't think we need that. I think it's commonsense that certain offenses would be serious enough that they would be grounds for immediate discipline. I assume the progressive discipline policy has a standard to that effect.

Thus, it is very inappropriate to limit the testimony regarding why progressive discipline is not followed in all cases and why it was not followed in Tarry's case and then find fault with Respondent for allegedly not following progressive discipline regarding Tarry's speeding, unprecedented crossing over a double yellow line, narrowly averting a head-on collision, and reckless driving.

19. Exception is taken to the ALJ's conclusion that there is a "policy" that an employee is asked his or her version of events when an investigation is conducted and before disciplinary action is taken. (ALJ Dec. Page 16, lines 38 to 39). Mensch qualified his answer to the question by saying "to his knowledge". (Tr. 133), which means there may be circumstances when an employee is not asked for his or her version of the events. Further, Vopat never used the term "policy" and he qualified his testimony by stating that there are scenarios where employees do not give a written statement, such as if they do not want to (Tr. 858, lines 20 to 23). Please also recall that Vopat testified that he gave Tarry the opportunity to write down a rebuttal on the termination notice, but she did not take advantage of that opportunity (Tr. 868).

20. Exception is taken to the ALJ's conclusion that there was union activity by Amalgamated Transit Union Local 1181 ("Local 1181") in October 2014. (ALJ Dec. page 17, lines 20 to 24). None of the Respondents' witnesses acknowledged that such activity took place.

21. Exception is taken to the ALJ's conclusion that Thomas "yelled that she had no business being on the property handing out union cards and needed to go home" (ALJ Dec. page

25, liens 14 to 15). Thomas merely told Tarry “why don’t you go home, your shift is over” (Tr. 1354).

22. Exception is taken to the ALJ’s conclusion that Thomas told Tarry, “you will regret what you’re doing” (ALJ Dec. page 25, line 17). Thomas told Tarry “we’ll see about that” (Tr. 1354). Moreover, after obtaining the advice of counsel that it was Tarry’s legal right to hand out cards, Thomas took no further action regarding the matter (Tr. 1354).

23. Exception is taken to the ALJ’s conclusion that there were flaws in the Respondent’s presentation of facts surrounding the decision to discharge Tarry (ALJ Dec. page 27, lines 7 to 16). While Counsel pointed out that Tarry was not disciplined for talking on the cell phone in June 2015 (Tr. 1341), Thomas testified that the candy incident, driving with no hands, and talking on the cell phone all played a part in the decision to discharge (Tr. 1361). There is no flaw in such presentation of facts. Nor is there any negative inference that should be drawn from the testimony by Thomas that she informed Mensch of the recommendation to discharge Tarry and her approval of same on Sunday evening, October 18, 2015 (Tr. 1362 to 1363), and Mensch’s testimony that he was notified after the decision was made and that Thomas also called him the next day after the termination was made (Tr. 1961).

24. Exception is taken to the ALJ’s conclusion that the issuance of the October 30, 2014 warning for failure to follow instructions, safety violations, and insubordination was pretextual and that the real motivation was animus for Tarry’s perceived or expressed union sympathies (ALJ Dec. page 49, lines 23 to 44).

25. Exception is taken to the ALJ’s conclusion that the October 30, 2014 warning was relied upon to justify Tarry’s December 2015 termination is pretextual (ALJ Dec. page, 49, lines 44 to 45). While the danger of handing out candy to children was a consideration regarding the

October 19, 2015 discharge, (Tr. 1361) there is no evidence it was a consideration regarding the December 2014 decision to lay off Tarry.

26. Exception is taken to the ALJ's conclusion that the November 4, 2014 warning was motivated by animus for Tarry's perceived or expressed union sympathies, and that any reliance on the November 4, 2015 warning to justify Tarry's [October] 2015 discharge was pretextual (ALJ Dec. page 50, lines 1 to 24).

27. Exception is taken to the ALJ's conclusion that any actions Respondent took against Tarry after December 2014 were motivated by protected concerted activity or express support for the Teamsters or perceived support for Local 252, including the September 2015 change in Tarry's assignments from a bus to a van (ALJ Dec. page 50, line 26 to page 52, line 20).

28. Exception is taken to the ALJ's conclusion that the General Counsel established a *prima facie* case under Wright Line as to both union and protected concerted activity with respect to the reassignment of Tarry from a bus to a van (ALJ Dec. page 51, line 37 to page 52, line 8).

29. Exception is taken to the ALJ's conclusion that Respondent did not rebut the General Counsel's *prima facie* case with regards to the decision to reassign Tarry from a bus to a van (ALJ Dec. page 52, lines 10 to 20).

30. Exception is taken to the ALJ's conclusion that the decision to reassign Tarry from a bus to a van violated Section 8(A)(3) and (1) of the Act (ALJ Dec. page 52, lines 10 to 20).

31. Exception is taken to the ALJ's conclusion that General Counsel established a *prima facie* case that Tarry was discharged on October 19, 2015 for union and other protected concerted activities (ALJ Dec. page 52, line 22 to page 53, line 3).

32. Exception is taken to the ALJ's conclusion that the Respondent did not meet its burden of showing it would have taken the same adverse action even in absence of the protected

activity regarding the October 19, 2015 decision to discharge Tarry (ALJ Dec. page 53, line 5 to page 55, line 16).

33. Exception is taken to the ALJ's conclusion that the October 19, 2015 decision to discharge Tarry violated Section 8(a)(3) and (1) of the Act. (ALJ Dec. page 53, line 5 to page 55, line 16).

34. Exception is taken to the ALJ's conclusion that Respondent engage in unfair labor practices with the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act by:

(a) Changing Tarry from a bus to a van on September 23, 2015 and

(b) Discharging Tarry on October 19, 2015.

(ALJ Dec. page 63, lines 18 to 32).

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Jericho, New York

Respectfully submitted,

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